

First, he argues that the section 193¹ relief was not specifically pled and does not fall under the rubric of either Count IX of the amended counterclaim, which seeks dissolution of Plessen, or Count X, which requests the appointment of a receiver for Plessen. For these reasons, Hamed argues, Yusuf's motion cannot be entertained without an amendment to the complaint that specifically asks for an order compelling the holding of a meeting to elect directors. But section 193 does not impose technical pleading requirements, and requires only that a "petition" (not a "complaint") be filed seeking this relief.² And even if the relief had to be pled in a complaint, it is fairly embraced by the Count X request for an appointment of a receiver in Yusuf's counterclaim. This is so because section 195,³ the provision of the Virgin Islands corporate code governing appointment of a receiver, includes as grounds for such an appointment the circumstance in which a court-ordered meeting is held under section 193 and no directors are elected because of an "equally divided vote" of the shareholders. Appointment of a receiver in this situation is the policy adopted by the Virgin Islands, Delaware and other jurisdictions to address the problem of shareholder deadlock between two 50% shareholder factions, combined with a self-perpetuating board of directors that is controlled by one of the factions. As the Court knows from prior briefing in this case, the same two Hamed directors

¹V.I. Code Ann. tit. 13, § 193.

²The Delaware cases construing the Delaware corporate code provision from which section 193 is drawn confirm that the procedure for petitioning the court for a summary order to compel the election of directors is streamlined and relatively informal. See In re: Osteopathic Hospital Association of Delaware, 191 A.2d 333, 334 (Del. Ch. 1963) (describing plaintiff's filing of "an application for a summary order of election pursuant to 8 Del. C. § 224" making the allegations of shareholder status and the failure to hold an election, and the subsequent issuance of an order "to show cause why the petition should not be granted"). The author of the Osteopathic Hospital Association opinion, the Honorable Collins J. Seitz, served as a judge of the Delaware Chancery Court from 1951 until 1966, when he was appointed to the U.S. Court of Appeals for the Third Circuit. Judge Seitz wrote the Third Circuit opinion in Moran v. Edsen, 493 F.2d 400 (3d Cir. 1974), the seminal Virgin Islands case on shareholder deadlock that has been cited in prior briefs by Yusuf.

³V.I. Code Ann. tit. 13, § 195.

have sat on the Plessen board for 26 years and, until April 30, 2014, had not conducted a single directors meeting since the formation of the corporation in 1988.

Next, Hamed argues that this motion is best raised in the derivative action brought by Yusuf's son (another shareholder of Plessen) on behalf of Plessen to recover for the corporation the \$460,000 stolen by one of Plessen's directors, Waleed Hamed, from Plessen's coffers. This argument misconceives the difference between a direct shareholder's suit or petition, such as that which is authorized by section 193, and a derivative lawsuit. A derivative action is a suit brought by a shareholder "to enforce corporate rights that the corporation itself is unable or unwilling to enforce on its own."⁴ Bryceland v. Minogue, 2014 U.S. App. LEXIS 10715, p. *6 (1st Cir. 2014). In a derivative suit, any relief granted is to the corporation; in a direct suit by a shareholder, the relief flows to the shareholder. See Weinstein v. Weinstein, 422 F.3d 476, 478 (7th Cir. 2005). Section 193 by its plain terms provides for enforcement of shareholder, not corporate, rights. It gives "any stockholder" a direct right to ask the court for the summary remedy of an order directing the holding of a shareholders meeting to elect directors. When a statute gives a shareholder a right to sue directly, the shareholder need not and indeed should not sue derivatively.

Next, Hamed argues that a section 193 order to conduct an election of Plessen directors is procedurally improper because "several members of the Yusuf family who own stock in Plessen have not been named as parties in this case." Hamed's Response at 5. Section 193 provides that "any stockholder" may bring the action, and imposes no requirement that other stockholders join in the action. The Delaware corporate code, like the Virgin Islands corporate code, provides that an annual meeting of stockholders shall be held for the election of

⁴For that reason, in a derivative action, the shareholder must first demand that the corporation take the desired action itself, or show that such a demand would be futile. See Bryceland, supra at pp. *6-7.

directors,⁵ and it sets forth procedures to ensure compliance with that mandate, including a “petition to the Court” to “summarily order a meeting to be held upon the application of any stockholder.” Coaxial Communications, Inc. V. CAN Financial Corporation, 367 A.2d 994, 998 (Del. 1976) (internal quotation marks omitted). The Delaware statute, like the Virgin Islands statute, “does not distinguish between large and small stockholders, nor between those in accord with and those in opposition to existing management.” Id. at 998. “Each has the right to invoke judicial aid in compliance with [the Delaware counterpart to section 193].” Id. at 998. Hamed’s insistence that Yusuf alone cannot ask for an order under section 193 contravenes the plain words of that section of the corporate code.⁶

The Delaware cases make it clear that a plaintiff makes a prima facie case for an order directing the holding of a meeting to elect directors if: a) the plaintiff demonstrates that he is a shareholder of the corporation; and b) shows that a meeting to elect directors has not been held for 13 months or more since the last annual meeting. See Speiser v. Baker, 525 A.2d 1001, 1005 (Del. Ch. 1987). Because of “the central role of the shareholders’ annual meeting in the scheme of corporate governance . . . , once these statutory elements have been shown, the cases have recognized that the right to an order compelling the holding of such a meeting is virtually absolute.” Id. at 1005 (internal quotation marks omitted). Section 193 should be similarly

⁵See V.I. Code Ann. tit. 13, § 191 (“meetings of the stockholders shall be held annually for the election of directors. . .”).

⁶The Delaware code provision that is the counterpart to section 193 is codified at 8 Del.C. § 211. That section in turn is derived from former section 224 of the Delaware Code. See Bentas v. Haseotes, 769 A.2d 70, 75 (Del. Ch. 2000) (stating that “Section 224” is “now Section 211”). The differences between former section 224 and current section 211 are minor. Former section 224 referred generally to “a failure to elect directors . . . at the designated time” and current section 211 refers to a failure to hold the meeting to elect directors “within 30 days of the date designated therefor or, if no date had been set, for 13 months since the last annual meeting.” See In re: Osteopathic Hospital Association of Delaware, 195 A.2d 759, 760 (Del. 1963) (quoting from former section 224); 8 Del. C. § 211 (Supp. 2014). The legislative history note for section 193 of the Virgin Islands corporate code states that the provision was “suggested by,” inter alia, Delaware code section 224.

construed, especially in light of the fact that it was inspired by Delaware law and serves the same policies. Here, Hamed admits that Yusuf is a shareholder and has admitted previously that no meetings of shareholders or directors have ever been held. As such, this Court should order the shareholders meeting to be conducted for the purpose of electing directors.⁷

Respectfully submitted,

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: October 8, 2014

By: 

Gregory H. Hodges (V.I. Bar No. 174)
1000 Frederiksberg Gade - P.O. Box 756
St. Thomas, VI 00804
Telephone: (340) 715-4405
Telefax: (340) 715-4400
E-mail: ghodges@dtflaw.com

and

Nizar A. DeWood, Esq. (V.I. Bar No. 1177)
The DeWood Law Firm
2006 Eastern Suburbs, Suite 101
Christiansted, VI 00830
Telephone: (340) 773-3444
Telefax: (888) 398-8428
Email: info@dewood-law.com

Attorneys for Fathi Yusuf and United Corporation

⁷Hamed effectively argues that the right to this relief is not absolute here because of the uncertainty over whether the Plessen bylaws were ever adopted. Hamed claims that the Court must first resolve that issue before ordering an election. See Hamed's Response at 3. The Court need not delve into that issue at this time, because, as Hamed acknowledges in a footnote, even if bylaws were never enacted, one can rely on the articles of incorporation, which are also of record in this case. *Id.* at 3, n. 2. The seventh article of the Plessen articles of incorporation provides that the "By-Laws of the corporation shall set the number of directors thereof, which shall not be less than three." The eighth article provides that "the first board of directors" shall be comprised by Hamed, Waleed Hamed and Fathi Yusuf, who shall serve until "their successors are elected and qualified. . . ." Section 2.2 of the bylaws does not change the number of directors, and it simply reiterates the Virgin Islands statutory requirement that "the Directors shall be elected at the annual meeting of the Stockholders" Even if no bylaws were ever adopted, the annual meeting to elect directors is mandatory, and a summary order under section 193 is the means of enforcing this requirement.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 2014, I caused the foregoing **Fathi Yusuf's Reply Brief in Support of his Motion for Summary Order Directing Election of Plessen Directors** to be served upon the following via e-mail:

Joel H. Holt, Esq.
LAW OFFICES OF JOEL H. HOLT
2132 Company Street
Christiansted, V.I. 00820
Email: holtvi@aol.com

Carl Hartmann, III, Esq.
5000 Estate Coakley Bay, #L-6
Christiansted, VI 00820
Email: carl@carlhartmann.com

Mark W. Eckard, Esq.
Eckard, P.C.
P.O. Box 24849
Christiansted, VI 00824
Email: mark@markeckard.com

Jeffrey B.C. Moorhead, Esq.
C.R.T. Building
1132 King Street
Christiansted, VI 00820
Email: jeffreymlaw@yahoo.com

The Honorable Edgar A. Ross
Email: edgarrossjudge@hotmail.com



R:\DOCS\6254\INDRFTPLDGA15D6314.DOCX

**DUDLEY, TOPPER
AND FEUERZEIG, LLP**
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, U.S. V.I. 00804-0756
(340) 774-4422